United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21515

BRIEF FOR APPELLANT

247

UNITED STATES

Appellee

v.

Criminal No. 455-67

EUGENE C. CUNNINGHAM

Appellant

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Washington, D. C. 20036

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STATEMENT OF THE CASE

On February 25, 1967, between 7:00 p.m. and 8:00 p.m., Herman Guttesman was in his place of business, located at 904 First Street, Northwest, in the District of Columbia. With him was his employee, one Archie Rice. (Tr. 12-13, 18).

At approximately 7:25 p.m., Rice left the grocery to get the correct time "across the street", and Guttesman began telephoning to accomplish the same thing. His back was to the entrance to the store. When he turned toward the entrance after completing his telephone call, he saw two men in the store. Rice had not yet returned (Tr. 13).

Both men were "completely hooded" so that one "couldn't see their faces at all". (Tr. 13; Prel. Hrg. Tr. 7). The taller of the two had a "short-barreled, snub-nosed revolver, approximately a .32, a black one". He pointed the gun at Guttesman, and said "Don't move". He told the shorter masked man to "Go get it". (Tr. 13).

Guttesman picked up a "cord" (Tr. 14), or a "stick" (Tr. 57), or a "handle from a hammer or something made of wood" (Prel. Hrg. Tr. 4) which he kept near his cash register. At this instant, Rice returned to the grocery, the man holding the gun "swiveled" and advanced further into the store. (Tr. 14, Prel. Hrg. Tr. 4). Guttesman at this point either grabbed

This case has not previously been before this Court

a couple cans ... and let fly" (Prel. Hrg. Tr. 4) or ducked behind his counter once or twice after grabbing "a couple of cans of canned goods". (Tr. 14-15, 57). In either event, both men then fled the store, the taller first with the shorter man following. (Tr. 14). The shorter man neither moved nor spoke before fleeing, and the two men were in the store only about two minutes. (Tr. 20, 46; Prel. Hrg. Tr. 8-9).

Guttesman immediately telephoned the police, reporting the two men as being Negros, one taller than the other, with both wearing multi-colored bandannas. (Tr. 13-15). The taller had a gun and wore a long black trench coat and a hat. (Tr. 21, 26; Prel. Hrg. Tr. 5). The shorter wore a brown corduroy jacket and a cap (Tr. 49-50). The men, Guttesman reported, had turned towards K Street, "going up K to L". (Prel. Hrg. Tr. 5).

Police Officers Raymond M. Pearson and Peter F. King were on cruiser duty during the date and the time in question. At about 7:30 p.m., they received a look-out call for two Negro males, one being armed, going north on First Street heading towards K. (Tr. 64, 129; Prel. Hrg. Tr. 11). Pearson saw two Negro males leaving the mouth of the alley on L Street. The cruiser followed the two men. A second

look-out call describing the clothing worn by the suspects was radioed through the police network. By this time, the two men were on the north side of the 100 block of L Street going toward New Jersey Avenue. (Tr. 129-130).

The two men the officers were following were bare-headed. (Tr. 77, 130). One was wearing a long dark trench coat. (Tr. 63). They were either walking (according to Officer King - Tr. 63) or running (according to his partner Officer Pearson - - Prel. Hrg. Tr. 11). In the 100 block of L Street, the cruiser was driven alongside the two suspects, and Officer Pearson called to them. One ran, and Officers Pearson and King arrested and handcuffed the other at the accosting location. During the scuffle, Officer King struck the suspect on the head with a flashlight and kicked a .32 caliber rovolver, which dropped from the suspect's pocket, under the police cruiser. (Tr. 11, 64-65). The arrested man had with him a principally green ski mask, but no bandanna. (Tr. 73, 125, 128-129; Prel. Hrg. Tr. 12). This suspect was placed into a police "wagon" and transported to the Guttesman grocery store. (Tr. 125). His name is Cunningham (Tr. 125).

Officer Owen C. Thompson on the date and at the time in question was on duty in a police scout car. He, too, received the broadcasted look-outs, and as a result thereof

arrested another Negro male just south of L Street on Third Street, Northwest. (Tr. 86-87). At the time of his arrest, this man was bare-headed and wearing a three-quarter length black corduroy coat with a multi-colored scarf in his pocket. (Tr. 88, 91). He had no cap with him, and none was found by the police. (Tr. 91). After his arrest, the suspect was taken to Guttesman's market by Officer Thompson. (Tr. 87). His name is West. (Tr. 87).

At the Guttesman grocery, Cunningham was required to repeat the words used by the taller of the two suspects. (Tr. 126). A hat bearing the initials "L.L.", which Guttesman stated was left behind by the would-be robbers, was placed on Cunningham's head by a police officer after Guttesman stated he was not certain of Cunningham's identity (Prel. Hrg. Tr. 9, 58-59, 151). The officer then stated "That is the one", and Guttesman said "This sort of looks like the one". (Tr. 151). No ski mask was shown to Guttesman. (Tr. 128-129). During the Guttesman confrontation, neither Cunningham nor West was represented by counsel, and neither had been brought before a committing magistrate.

At the trial, the prosecution produced one multi-colored bandanna. Guttesman identified it as being similar to those worn by the would-be robbers. (Tr. 16, 59). The

"long black trench coat" worn by Cunningham at the time of his arrest was not produced (Tr. 23-26). The ski mask which was in Cunningham's possession at the time of his arrest was not produced. (Tr. 128, 151). Guttesman's employee who witnessed the hold-up attempt, Rice, was not produced at trial. (Tr. 71-73). No fingerprints were taken from the gun which the police testified they took from Cunningham, although Cunningham denied that the gun was his or that he knew anything about it. (Tr. 67-68, 150-151).

Guttesman stated that he was excited while the holdup attempt was occurring and during the subsequent identification scene with the police. (Tr. 46, 54; Prel. Hrg. Tr. 9). Although West had worked for Guttesman in the grocery for a few weeks not too long before the attempted robbery, Guttesman did not recognize him during the holdup attempt. (Tr. 20, 54; Prel. Hrg. Tr. 8-9). He saw West only "...out of the corner of (his) eye", knew only that he was wearing "something dark", and was shorter than the man with the gun. (Prel. Hrg. Tr. 5-7). He identified West as one of the two men when he was brought to the grocery because of "His short stature compared to the other one. The police officers brought them both back in within ten minutes". (Prel. Hrg. Tr. 9). During the trial, counsel for

West asked Guttesman whether he was sure of his identification of West's jacket. Guttesman answered, "Well, put it this way: They brought them back within a few minutes". (Tr. 47). Most of the time, Guttesman admitted, he had his "eyes on the fellow with the gun". The other man was short, had a bandanna over his face, and had on a dark jacket. "That's about all I could describe with him because I had my eyes all on the man with the gun". He could only see West's eyes. (Tr. 46-47; Prel. Hrg. Tr. 5).

As for Cunningham, Guttesman had never seen nor spoken to him before February 25, 1967, nor could he identify him by his face. (Prel. Hrg. Tr. 7; Tr. 20-21). "He was completely covered. You could hardly see his eyes". (Tr. 53). Guttesman at one time justified his identification of Cunningham by saying, "Well, coming back that first day with that long black coat" and the fact that West is shorter than Cunningham. (Tr. 21-22). Later, he said:

> "Let me put it this way: Within five minutes the men were brought in. Within five minutes they brought this man in with the same height, the same build with a long black coat." (Tr. 54).

When asked if his identification was really based on the return of two men to his grocery so soon after the holdup attempt, Guttesman said, "No, because of their dress, their height and their build. (Tr. 54).

Some I/P evidence

Witnesses for the government were the complainant Guttesman and Officers King, Pearson, and Thompson. The defense called Cunningham and West. Both Guttesman and Officer King had testified before the Grand Jury. Despite requests by defense counsel for the Grand Jury minutes pertaining to such testimony, the Court upon objections by the prosecutor refused to make them available. (Tr. 28-45, 74-75).

The jury found Cunningham guilty of assault with a dangerous weapon, assault with intent to commit robbery, and carrying a dangerous weapon. He was sentenced to serve eight years pursuant to Title 18, United States Code, Section 5010(c), Federal Youth Corrections Act. Cunningham presently is serving that sentence.

STATEMENT OF POINTS

1. The trial court erred in not barring from the record any evidence of the Guttesman identification of Cunningham made at the Guttesman market shortly after Cunningham's arrest, and in not barring testimony of subsequent identification of Cunningham by Guttesman unless it could be shown that such subsequent identification had a source independent of the grocery identification made by Guttesman.

2. It was error for the trial judge to deny motions by defense counsel for the production of the grand jury testimony of Guttesman and Officer King.

SUMMARY OF ARGUMENT

The Supreme Court has made its concern clear with pre-trial identification procedures involving suspects and witnesses where other than properly conducted line-ups are utilized. At any time that a suspect is summarily taken before a witness in any fashion which creates an unfair suggestion that the suspect is, in fact, the criminal and the identification process cannot be sustained upon a need basis, a violation of the due process clause of the Fifth Amendment occurs. In this instance, no valid reason for the confrontation in the Guttesman market between Cunningham and Guttesman existed. If Guttesman could make a proper identification at that time, he could as easily have done so in a police supervised line-up. Immediacy was not required. In any event, the conduct of the police at the market in stating to Guttesman that Cunningham was the hold-up man, and in stating to Guttesman that they had found a gun in Cunningham's possession so degraded the relative impartiality of the procedure to the point where

Cunningham's due process right was violated.

The government's case rested in chief, upon the identification of Cunningham by Guttesman, supported by the testimony given by one of the two arresting officers, King. Guttesman had given different descriptions of Cunningham's clothing (a key identification factor) at various times, and Officer King's testimony regarding the possession of a gun by Cunningham and the circumstances of its acquisition by the police were disputed. Under these circumstances, denial of requests for the grand jury minutes of the testimony of both men was in error.

ARGUMENT

I

Absent An Imperative Need To Display A Suspect To A Witness For Identification Purposes Without Affording Selective Identification Possibilities, It Is Error To Accept Testimony Of Such An Identification, Particularly Where Police Statements Are Suggestive.

In 1967, the Supreme Court focused attention again upon pre-trial confrontation procedures which might lead to mistaken identification of suspects by witnesses who are prejudicially amenable to the power of suggestion. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967. It recognized that

the practice of showing a single suspect to a witness for the purpose of identification, not as part of a properly conducted line-up, has been widely condemned. A claimed violation of due process based upon confrontation procedures must be examined, however, in the totality of the circumstances.[1] The record in Stovall, thus reviewed, revealed that the showing of the defendant to the witness was imperative as to time and that the police followed the only feasible identification procedure as to the circumstances and place thereof.

Since the Stovall decision, this jurisdiction has decided two cases involving suspect-witness confrontations, Wise v. United States, 383 F.2d 206 (1967), and Wright v. United States, (D. C. Cir., January 31, 1968), F.2d . The former considered under Stovall guidance whether the

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1. Stovall involved the death of a husband by stabbing and the critical wounding of the wife. Two days after the offense, the defendant, a Negro, was taken to the wife's hospital room for identification by seven white law enforcement officials. At that time, it was not known whether the wife would survive, she could not leave her room, and her hospital location was relatively near to the courthouse and to the jail. Under these circumstances, a police line-up was not possible.

circumstances of the confrontation[2] were so unfair as to require exclusion of testimony thereof, found them not to be, and set forth the proposition that prompt identification of a suspect apprehended immediately after the offense is sound as a general procedure. Wright involved a confrontation between witness and the suspect at a police station. The Court remanded the case for amplification of the record before a determination of the defendant's identification challenge under the Stovall doctrine.

Certainly, as expressed in Wise, prompt identification of a suspect normally is sound police procedure. Fresh identification is provided thusly, and is not inherently adverse to the rudiments of fair play. However, as the Court in Wise noted, a particular identification promptly made at the scene may have been conducted in such an unfair way as to amount to a denial of due process without denying the general principle of prompt identification.

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2. Wise involved a housebreaking where the husband chased the defendant from the house, caught a good look at him during the chase when the defendant stopped momentarily under a street light, never lost sight of the defendant during the pursuit, caught the defendant, and was with the defendant when the police arrived to make the arrest. The police returned the defendant to the house, some few blocks away, for voice identification by the wife who could not identify the defendant visually.

Wise involved a "hot" pursuit wherein the husband caught the housebreaker in the act, never lost sight of the defendant from discovery to arrest, and made positive visual identification at the arresting site independent of any suggestion of police prompting. The wife made voice identification only. Despite the nature of the apprehension by her husband and the police, the wife could not identify the suspect by sight. These facts differ considerably from those now before the Court.

In this case, there was no hot pursuit. Arrests were made by different police officers three or more blocks from the crime scene upon the basis of a broadcast look-out. Identification was not made upon the basis of voice although Cunningham was made to repeat commands given by the hold-up man. Indeed, Guttesman failed even to recognize during the hold-up attempt his prior employee, West.

The entire hold-up attempt consumed approximately two minutes. Guttesman was excited and he linked his identification of Cunningham to the fact that the police appeared at the grocery with Cunningham within five or ten minutes after the hold-up attempt. Cunningham is a Negro. That part of the Guttesman description to the police fit. He is taller than is West. That fit also.

Cunningham was wearing, according to Guttesman, a "long black" coat. Be it recalled that Guttesman reported to the police that one of the men was wearing a jacket with the taller man having a long black coat. West (allegedly the jacket man) was wearing at the time of his arrest a three-quarter length black corduroy coat according to Officer Thompson. How long is long in Guttesman's eyes is impossible to determine from the record since the government did not produce for jury inspection the coat worn by Cunningham at the time of his arrest. Nor did Guttesman recognize any of Cunningham's other clothing, such as his trousers or his shoes. Under these circumstances, there is more than a suggestion that any two young Negro males different in height might have been identified by Guttesman at his store shortly after the hold-up attempt. The suggestion becomes more urgent when coupled with a police representation that a revolver was taken from Cunningham and the statement by police to Guttesman that "This is the one" in referring to Cunningham after placing a hat on his head.

Nor was a need for an immediate identification present. Unlike Stovall, where the witness was in danger of dying and could not attend a line-up procedure, Guttesman was uninjured and could have viewed Cunningham at any time.

And Cunningham could have been held. He was, according to the police, carrying a gun without a permit so to do. No good reason existed here for the failure to safeguard against mistaken identification by use of the line-up procedure. Nothing was gained by the "freshness" of the identification at the grocery. Weighed by the totality of circumstances concept of Stovall, the single suspect immediate-on-the-scene format used is so fundamentally unfair as to deprive Cunningham of due process.

II

It Is Error To Deny Defense Counsel Access To Pertinent Grand Jury Minutes After Trial Testimony Of Key Government Witnesses Where Such Testimony Varies With Previous Statements Or Where It Is Disputed In Critical Areas.

In Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840 (1966), the Supreme Court reviewed the policy which traditionally maintained the secrecy of grand jury proceedings in federal courts. It spoke, however, of the "...growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice", 384 U.S. at 1849, and set forth the proposition that where a request is made after indictment for disclosure by a criminal defendant of prior testimony of a witness who has testified at trial, none of the reasons traditionally advanced

to justify non-disclosure of grand jury minutes are significant. The old criterion of a "particularized need" is of limited value at best, and "Where a question of guilt or innocence may turn on exactly what was said the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." 384 U.S. at 1850.

Subsequent to Dennis, this Court considered grand jury minutes disclosure in Worthy v. United States, 383 F.2d 524 (1967). It required, in light of Dennis, a new trial upon the basis that possible inconsistencies between grand jury and trial testimony required grand jury minutes production by the government. An important aspect of this case was that of identification, and the Court was of the view that any inconsistency between testimony might have been sufficient to raise in the jury's mind the question of the accuracy of memory of the government's key witness.

Again, in Allen v. United States, 390 F.2d 476 (1968), this Court held that only a threshold showing of need for grand jury minutes is necessary to require production thereof. While production of a witness' grand jury testimony should not be compelled in every case upon a mere request, such minutes should be produced

where key government witnesses at trial have appeared before the grand jury, where guilt or innocence turns upon the accuracy of such trial testimony, and where testimony given before a grand jury was substantially fresher than that given at trial. In Allen, the government depended heavily upon the testimony of the arresting police officer. Defense counsel's requests for minutes of his grand jury testimony were denied upon the basis of a failure to show particularized need.

In the present case, the key witness for the government was Guttesman,[3] the crucial identification factor resting upon his testimony alone. The record demonstrates critical differences in his descriptions of the suspects given to the police. Thusly, Guttesman differed at times as to the color of the jacket or sweater of West, and his definition of "long" as to the coat worn by Cunningham is suspect. He did not use that term as to West's apparel, although the officer who arrested West testified that he was wearing a three-quarter length coat. Yet, clothing

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3. In De Binder v. United States, 292 F.2d 737(1961) this Court also held that where the government's case rests largely upon the testimony of a sole witness and there is ground for a suspicion of inconsistencies in identification, production of earlier testimony is required. The defense need not make a preliminary showing that contradictions exist between witness' testimony before the grand jury and during trial.

was the central element of Guttesman's identification of Cunningham. Officer King also testified before the grand jury as one of the two arresting officers of Cunningham. His trial testimony as to Cunningham's possession of a gun and to police acquisition of it was disputed by Cunningham.

Not only were both Guttesman and King key witnesses, but the government failed to produce the "long" black coat upon which Guttesman's identification of Cunningham was substantially dependent, thus making any testimony as to that garment even more critical. Additionally, Rice, Guttesman's employee who witnessed the hold-up attempt, was not produced. Guttesman was the only eye witness the jury heard. Under these circumstances, denial to defense counsel of the grand jury testimony of Guttesman and King is error.

CONCLUSION

The identification confrontation at the scene of the attempted hold-up within minutes after the crime was not impelled by imperative need. It could have been held as easily within the safeguards of a properly conducted line-up, and both Guttesman and Cunningham would have

been available to the police for that purpose. In the atmosphere generated by Guttesman's excitement and the generality of his suspect descriptive information, the suggestive procedure used by the police at the grocery to facilitate identification of Cunningham is violative of due process. Further, more than the required need having been demonstrated at trial for the production of the Guttesman-King grand jury minutes, denial of requests therefor likewise constitutes error.

For these reasons, the Court is urged to remand this case with the mandate that Guttesman's identification testimony of Cunningham based upon the grocery store confrontation is inadmissible, that any other such testimony to be admissible must be shown to be free of taint, and that the grand jury minutes of both Guttesman and Officer King be made available to defense counsel.

Respectfully submitted,

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September 16, 1968

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following questions are presented:

1. In the instant case, where a limited identification took place at Mr. Guttesman's grocery store approximately five minutes after the attempted robbery, was such identification justifiable and non-violative of accepted due process standards?
2. Is a showing of some semblance of need required in the District of Columbia in order for appellant to receive Grand Jury minutes and is such need satisfied by a mere allegation of potential inconsistencies in the testimony of a witness?

* This case has not previously been before this Court under this or any other name.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21515

EUGENE C. CUNNINGHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from a Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On October 10, 1967, after trial by jury, appellant was convicted of one count of assault with intent to commit robbery (22 D.C. Code 501), one count of assault with a dangerous weapon, (22 D.C. Code 502), and one count of carrying a dangerous weapon (22 D.C. Code 3204). He was sentenced to eight years pursuant to Title 18 U.S.C. Section 5010 (c), Federal Youth Corrections Act.

At trial Mr. Herman Guttesman, a chief witness for the government, testified that on the evening of February 25, 1967, at approximately 7:25 P.M., an attempted robbery at gun point occurred in his store located at 904 First

Street, N.W., in the District of Columbia. He stated that his assistant, Archie Rice, left the store to check the right time and while he was calling to find out the time himself, two bandits, one tall and one short, entered his store. They were completely hooded and their faces were not visible. (Tr. 13). Mr. Guttesman testified that the tall one wore a long dark coat and pointed a short barreled snub-nosed revolver at him, saying, "Don't move, don't move." (Tr. 13). When the tall man turned to the small man saying, "Go get it, go get it," Mr. Guttesman instinctively stepped back and the tall man again stated "Don't move, don't move." (Tr. 14). At this time Archie Rice walked into the store and on seeing the robbers, quickly crouched down. The tall man with the gun swiveled on him and told him not to move—in the meantime telling the shorter man again to "Go get it, go get it." The shorter man did not move and the tall man turned on Mr. Guttesman who instinctively ducked. At this time, Mr. Guttesman grabbed a couple of tins of canned goods and the tall man ducked and went out the door, apparently dropping his hat. The shorter fellow followed him, whereupon Mr. Guttesman called the police department and reported the attempted robbery. (Tr. 14).

Further direct questioning of Mr. Guttesman elicited a more detailed description of what the men had worn. In addition to describing the relative height of each man, he also pointed out that the shorter man, later identified as Charles L. West, was wearing a multi-colored bandanna. Similarly, Mr. Guttesman testified that the taller man, later identified as appellant, also wore a multi-colored bandanna. (Tr. 15-16). Mr. Guttesman further identified a Smith and Wesson 32 caliber snub-nosed pistol, which was taken from appellant, as looking exactly like the pistol seen by him in the hand of the taller bandit. (Tr. 18, 65).

Mr. Guttesman testified that four or five minutes from the time he notified the police of the attempted robbery, appellant and Charles L. West, a former employee of Mr. Guttesman, were brought back to his store by the police.

(Tr. 21). A limited identification of the men was made by Mr. Guttesman on the basis of relative height, build, and the long black coat worn by the taller man identified as the appellant. He was unable to identify their features as they had worn bandannas at the time of the attempted robbery. He further identified the shorter man's jacket as being dark colored—probably corduroy. (Tr. 20-22, 27). On cross examination, Mr. Guttesman reiterated his identification of appellant and Charles L. West based on their relative sizes and the description of their clothing, together with the multi-colored bandannas they were each wearing at the time of the attempted robbery. (Tr. 46-51). Defense counsel at that time attempted to show inconsistencies in Mr. Guttesman's identification based on the color of the coat worn by Mr. West. (Tr. 49-51). In addition, defense counsel utilized testimony given by Mr. Guttesman at the preliminary hearing held on February 27, 1967, at the District of Columbia Court of General Sessions, two days after the attempted robbery took place, in an attempt to point up alleged inconsistencies. (Tr. 51-56).

At the close of Mr. Guttesman's direct testimony, defense counsel requested all Jencks Act statements, the Grand Jury summary and the Grand Jury minutes. (Tr. 28). All materials were turned over to defense counsel except the Grand Jury minutes, which precipitated a lengthy debate. (Tr. 28-45).[1]

It was pointed out by defense counsel that he made an oral request for the minutes from the Government several weeks before trial (Tr. 40). However, the Government pointed out that the request was allegedly made orally and that, in the press of daily business, could not be recollected. (Tr. 42). In justifying his right to the minutes, appellant argued first that there need not be a

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[1] There is either a numbering omission or pages of the transcript are missing between pages 28 and 40. The Government has checked with appellant's counsel, the clerk of the Court, and the Court reporter, none of whom have the missing pages or can adequately account for the apparent twelve page lapse.

showing of particularized need and that such Grand Jury minutes should be turned over to him for the general purpose of showing inconsistencies in testimony. In the alternative, he argued that there was a particularized need in this particular case. As to both arguments, the Court denied the motion.[2]

Detective Peter F. King, another Government witness, testified that on the evening of February 25, 1967, while in cruiser 201, he responded to a call for an attempted robbery in the area of First and K Streets, N.W. He received a police radio lookout giving a general description of two men who attempted the robbery of Mr. Guttesman's store. Detective King observed appellant and Mr. West walking west in the 100 block of K Street, N.W. (Tr. 63). Being suspicious, he followed appellant and Mr. West in his police cruiser, awaiting further descriptive information concerning the robbery over the police radio. A further description was radioed of the two suspects. After receiving this lookout, Detective King and his partner, Detective Raymond Pearson, pulled up alongside appellant and his partner and told them to stop. They stopped momentarily and then one of them ran. Detective Pearson got out of the cruiser and placed appellant under arrest. Appellant resisted and Detective King went to assist his partner. During the ensuing scuffle, a 32 caliber revolver dropped from the right-hand coat pocket of the appellant to the pavement. Detective King kicked the gun under the car. (Tr. 64-65, 131). On bringing appellant back to Mr. Guttesman's grocery store, Detective King saw Mr. West, who had been apprehended by another officer. (Tr. 66). Detective King stated that at the time of apprehending appellant, appellant was wearing a long dark trench coat. (Tr. 68). On cross examination, defense counsel utilized testimony officer King gave at a pretrial proceeding held on May 19, 1967, in an attempt to demonstrate inconsistencies in his testimony. (Tr. 79).

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[2] Defense counsel made another request for the Grand Jury minutes with respect to Detective King, which was denied by the Court. (Tr. 74, 75).

The last Government witness, Private Owen C. Thompson, testified for the Government and stated that he apprehended Mr. West on the night of February 25, 1967, and returned him to Mr. Guttesman's grocery store. (Tr. 87). He further testified on cross examination that he found a multi-colored bandanna in Mr. West's pocket. (Tr. 90).

At the conclusion of the Government's case, a motion for acquittal was made on behalf of appellant and Mr. West. Essentially, the issue raised was as to the propriety of the identification procedure utilized in this case and the inconsistencies allegedly pointed out in Mr. Guttesman's testimony, respecting his identification of appellant (Tr. 103-113). No further mention was made regarding the production of the Grand Jury minutes. The motion for acquittal was denied. (Tr. 113).[3]

Officer Raymond M. Pearson was called by the defense and essentially corroborated the testimony given by Officer King (Tr. 123-132). During direct examination of Officer Pearson by defense counsel, use was made of his earlier statements during the preliminary hearing held on February 27, 1967. (Tr. 127, 128). Further, Officer Pearson stated that although he was not certain, he believed he made appellant repeat the statements that were made during the attempted holdup. (Tr. 126).[4]

The defense also introduced the testimony of Mr. West and appellant who essentially testified that they had never been in the store on the night of question—that they met at a friend's house and were on their way to appellant's aunt's house to get some money when the police came up to them in the car and told them to stop. Mr. West denied

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[3] At the end of appellant's case, the motion for acquittal was renewed, for the same reasons given at the conclusion of the Government's case. The motion was denied. (Tr. 170)

[4] This is the only positive testimony elicited throughout the trial to what actions were required of appellant when he was returned to Mr. Guttesman's store. When asked about placing the mask on appellant for identification purposes, Officer Pearson replied in the negative. (Tr. 128, 129).

wearing a hat or having a bandanna or being involved in a hold-up in Mr. Guttesman's market in any way. (Tr. 133-137). Appellant essentially corroborated the testimony given by Mr. West and denied ownership of the long black coat, insisting that he borrowed it from a friend in the cell block. (Tr. 152-153, 159-162).

As to appellant, the jury returned a verdict of guilty on all three counts. Appellant now appeals that conviction.

STATUTES INVOLVED

Act of June 19, 1968, P.L. 90-351, 82 Stat. 197, 211, 18 U.S.C. § 3502 provides the following:

> "Section 3502. *Admissibility of evidence of eyewitness testimony.* The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States."

District of Columbia Code § 22-501, provides the following definition and penalty for assault with intent to kill, rob, rape, or poison:

> "Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or willfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years."

District of Columbia Code § 22-502 provides the following definition and penalty for assault with intent to commit mayhem or with a dangerous weapon:

> "Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years."

District of Columbia Code § 22-3204 provides the following definition and penalty for carrying concealed weapons:

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol without a license therefore issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years."

Rule 52(a) of the Federal Rules of Criminal Procedure provides as follows:

> "(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

SUMMARY OF ARGUMENT

I

The identification by Mr. Guttesman in his grocery store of appellant, who was brought back to the scene of the crime within five minutes, was proper. There were no facts elicited at trial that showed any procedure that was improperly suggestive so as to prejudice the identification. Such fresh identifications are justifiable and promote fairness and assure reliability. Any danger that this technique resulted in misidentification was substantially lessened by the cross examination at trial which pointed out to the jury the potential for error.

II

A showing of need is still required in this jurisdiction in order for defense counsel to obtain Grand Jury minutes. The defense must demonstrate some semblance of need

beyond a recitation that this is a "sole witness" situation. Further, some formal notice is required if Grand Jury minutes are sought.

Arguendo, should the Court find that the trial court erred in denying disclosure of the minutes, appellee contends that it is harmless error and the decision below should be affirmed. In the alternative, appellee contends the case should be remanded for the District Court to determine whether appellant was prejudiced by non-disclosure of the minutes or whether such non-disclosure was merely harmless error.

ARGUMENT

I. Appellant's immediate return to the scene of the crime and his presentment for identification purposes was not violative of accepted due process standards and was proper.[5]

(Tr. 15-18, 20-22, 54, 64, 65, 86, 87, 126-27.)

Returning a suspect or an arrested person to the scene of the crime, a short time after its occurrence, for purposes of identification, however limited by the complainant, is permissible and a legitimate police function. *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F. 2d 206 (1967); *Walker* v. *United States*, D.C. Cir., No. 20,309, decided by unpublished opinion June 17, 1968 (relying on *Wise*). Such a one-man showup is justifiable because such fresh identification promotes fairness by assuring reliability. *Wise* v. *United States*, *supra*, at 209; see also *Wright* v. *United States*, D.C. Cir. No. 20153, decided January 31, 1968, slip op. at 10, n. 2; *Hanks* v. *United States*, 388 F. 2d 171, 173, 174 (10th Cir., 1968).

On reading appellant's brief, it is apparent that he also feels that *Wise* v. *United States*, *supra*, in conjunction with *Wright* v. *United States*, *supra*, are controlling;

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[5] This identification in this case was made on February 25, 1967, and therefore *Wade* v. *United States*, 388 U.S. 218 (1967) is inapplicable. *Stovall* v. *Denno*, 388 U.S. 293 (1967).

however, he contends that the instant case works a denial of due process because the on-the-scene identification was conducted in an unfair manner, (App. Br. 9-14). The government contends that the identification procedure employed in this case was completely proper and in no way in violation of accepted due process standards.

Stovall v. *Denno*, 388 U.S. 293 (1967), upon which appellant relies as the fount from which his due process argument springs, states that any claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it, *Id* at 302.[6] Testing the limited identification in this case under this standard, the facts show that no violation of appellant's due process occurred.

The testimony at trial showed that appellant was stopped by Detectives King and Pearson in the vicinity of the attempted robbery of Mr. Guttesman's grocery store and, after a scuffle with these officers during which time a gun fell out of appellant's coat pocket, he was arrested and brought back to Mr. Guttesman's store. (Tr. 64, 65). Charles L. West, who was with appellant at the time he was told to stop, broke and ran. He was also caught and returned to Mr. Guttesman's store, (Tr. 86, 87). From the time Mr. Guttesman notified the police of the attempted robbery to the time that appellant was brought back for identification, approximately four or five minutes had elapsed. (Tr. 21).

Mr. Guttesman could not identify appellant's features, but did identify him by the coat he wore, by his relative

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[6] The Supreme Court, in *Simmons* v. *United States*, 388 U.S. 377 (1968), articulated the due process standard by stating that pretrial identification procedures (there photographic) would be set aside only if such procedure was "so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384. And in *Wise* v. *United States, supra*, this Court stated:

> It may be in a particular case there would be a reason, without denying the general principle of prompt identification to say that the particular identification at the scene was conducted in such an unfair way that it cannot tolerably be admitted into evidence. 383 F. 2d at 210.

size to Mr. West, who was also present, and by a multi-colored bandanna which he stated both gunmen wore at the time of the attempted robbery. (Tr. 15, 16, 20-22, 54). Further, Mr. Guttesman identified the gun recovered from appellant when it fell from his pocket as the same gun used by the taller gunman. (Tr. 17, 18). As to whether or not appellant was required to repeat the statements the gunman had said during the attempted robbery is not altogether clear, as Officer Pearson, the only person who testified on this point, was uncertain as to whether this was done. (Tr. 126, 127).

The above stated facts are not so different from the situation confronted by this Court in *Wise* v. *United States, supra;* a show-up shortly after the commission of a crime as a result of efficient police work, and an identification not by face but by height, build, clothing, and perhaps voice identification. In *Wright* v. *United States, supra,* there was uncertainty as to the time which had elapsed between the commission of the offenses and the confrontation which took place in the police station, the method by which complainant observed Wright, the persons present, and evidence relating to the feasibility of a lineup. *Id,* slip op. at 7. Here, the time factor was less than five minutes, the persons present were accounted for, the method of identification set out, and the scene known to be Mr. Guttesman's grocery store. Identification was necessary on the spot to assure the police that they in fact had the right men. Without such immediate identification, Charles L. West, against whom no charge could then be brought, would have been free and most assuredly no longer available for a subsequent lineup. Indeed, the very nature of the description given by Mr. Guttesman to the police required a comparison between the two men to fill out Mr. Guttesman's identification. Therefore, viewing all these factors in their totality, a lineup as urged by appellant would have been impracticable.

Therefore, the Government contends that the identification procedure in this case was entirely proper and not violative of due process standards. Any danger that this

technique resulted in a conviction based on misidentification was substantially lessened by the cross examination at trial which pointed out to the jury the potential for error. See also *Simmons* v. *United States, supra,* at 384.[7]

II. To obtain Grand Jury minutes in the District of Columbia, there is required a showing of some semblance of need and such showing requires more than a mere allegation of potential inconsistencies in the testimony of a witness.

(Tr. 40-42, 51-56, 62, 79.)

At the conclusion of Mr. Guttesman's direct testimony, appellant requested Jencks Act statements, the Grand Jury summary, and the Grand Jury minutes. All were given to him except the Grand Jury minutes, which were not available as no formal request in writing had been made in advance of trial. (Tr. 40-42)[8]

This jurisdiction has never gone as far as the Second Circuit in its decision in *Youngblood* v. *United States,* 379 F. 2d 365 (1967), which requires the production of Grand Jury minutes at the mere request of a defendant, without a showing of some need. This Court's recent pro-

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[7] Because the government firmly believes that no due process violation exists with regards to the identification procedure in this case, it believes that the appplicability and effect of Title 18, United States Code, Section 3502, the Omnibus Crime Control and Safe Streets Act of 1968 (Act of June 19, 1968, P.L. 90-351, 82 Stat. 197, 211), on this case need not be in issue. However, should the Court determine that a due process violation occurred, the Government respectively requests the right to raise the question of the applicability of Section 3502 to this case. The Government has made a similar request in the case of *Clemmons* v. *United States,* D.C. Cir. No. 19,846, presently awaiting an *en banc* hearing of this Court.

[8] A similar motion was made with respect to Detective King's testimony before the Grand Jury, which was also denied. (Tr. 74, 75). No subsequent motions regarding the minutes were made, either at the conclusion of appellants' case or at the conclusion of the Government's case. Indeed, appellant made a motion for acquittal, basing it upon the issue of identification and appellant's right to due process but omitting any mention of the refusal of the Court to require the production of the Grand Jury minutes. (Tr. 103-113, 170).

nouncement in *Allen* v. *United States*, —— U.S. App. D.C. ——, 390 F. 2d 476, (1968), with regard to this area states, "We do not hold that the production of a witness' Grand Jury testimony should be compelled in every case upon a mere request." *Id* at 481; see also *Gibson* v. *United States*, D.C. Cir. No. 21,650, decided August 30, 1968, slip op. at 4. In discussing *Youngblood* v. *United States*, *supra*, the Court in *Allen* stated:

> "Another circuit has held, in the exercise of its supervisory power over administration, that once the witness has testified his Grand Jury testimony should be made available automatically, subject to limited motions for protective orders. Since such production might involve at least delay at trial, *we do not require production where there is no semblance of need.*" (Emphasis added). 390 F. 2d at 481, 482.

Although this Court in *Allen* v. *United States*, *supra*, appeared somewhat dubious of the "particularized need" terminology found in *Dennis* v. *United States*, 384 U.S. 855 (1966), the intent of *Dennis* to require some showing of need is still the law in this jurisdiction, as it is in others which have recently examined the problem. *Gibson* v. *United States*, *supra*; *Walsh* v. *United States*, 371 F. 2d 436 (1st Cir., 1967); *National Dairy Products Corporation* v. *United States*, 384 F. 2d 457 (8th Cir., 1967); *Osborne* v. *United States*, 371 F. 2d 913 (9th Cir., 1967). For a defendant to have access to Grand Jury minutes, a showing in conformity with the *Dennis-Allen* guidelines must be made of the need for production. The Government contends that this was not done by appellant and the trial judge properly denied appellant's motion.

In each case relied upon by appellant, there was some overbearing reliance on one aspect of the fact situation that tilted the decision of the Court in favor of disclosure. In *Worthy* v. *United States*, 127 U.S. App. D.C. 329, 383 F. 2d 524 (1967), there was a three month delay between the alleged offense and the arrest and there was but one witness, an undercover police officer, who was present at the time of the crime. In *De Binder* v. *United States*, 110

U.S. App. D.C. 244, 292 F. 2d 737 (1961), there was a sole key witness and an alleged identical twin misidentification by that witness which was brought out in the testimony at trial, showing an inconsistency. *Id* at 738, 739. In *Allen* v. *United States, supra,* the person against whom the Grand Jury minutes were sought to show inconsistencies was a police officer, and the matter in question was a confession.

In this case, no inconsistencies were apparent at the time the motion for the minutes was made and no inconsistencies were pointed out by defense counsel as to the Grand Jury summary. Indeed, when viewing the arguments advanced by appellant's counsel, who had in his possession the preliminary hearing testimony of Mr. Guttesman and the motion to suppress testimony of Detective King, appellee contends that an insufficient showing was made by appellant for the minutes, as the opportunity to make such a showing was available, if in fact such a showing could be made.[9] The attempts made at showing inconsistencies by defense counsel at trial with testimony given by Mr. Guttesman and Detective King before trial

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[9] The preliminary hearing testimony was used by appellant's counsel to attempt to show inconsistencies in Mr. Guttesman's testimony (Tr. 51-56), as was the motion to suppress testimony used with regard to Detective King (Tr. 79). This contradicts the statement made by defense counsel:

> "Mr. Engelberg: Yes. If Your Honor would let me make a brief comment, there was a particularized need here. The argument I was making before we would be entitled without the particularized need. I feel that there is a particularized need because basically this is the sole witness and it is a very serious robbery charge. I can't make any showing of inconsistencies without them." (Tr. 41).

In *Gibson* v. *United States, supra,* this Court noted that there was a sufficient showing of need as appellant argued that complainant's testimony at the preliminary hearing contained inconsistencies, that the refusal of the Grand Jury to indict suggested that complainant's testimony there differed from that given at the preliminary hearing, as well as the fact that complainant was the key witness for the government. *Id* slip op. at 5. Such a showing was not made in this case.

could have formed a sufficient basis for the requisite "need" required by *Dennis* v. *United States, supra.*

The Government contends that the case at bar is not a "sole witness" case in the usual sense as contended by defense counsel at trial when attempting to justify his need for the minutes. (Tr. 41). The intended use of the minutes was to show identification inconsistencies with respect to Mr. Guttesman and in that regard, Officers King, Pearson, and Thompson were also available and competent to describe the clothing worn by appellant. While only Mr. Guttesman could testify as to whether appellant was in fact one of the men who attempted to hold him up, the focus for the use of the minutes was as to the clothing, height, and build of appellant, all of which was susceptible to corroboration or contradiction by the other Government witnesses. Additionally, appellant had available the police radio lookouts which, although never used, were available to test the consistency of Mr. Guttesman's identification testimony. (Tr. 62). Therefore, in viewing the total situation, the "sole witness" standard as envisioned in *Worthy, De Binder,* or *Allen,* appears not by itself to establish the requisite need. Further, appellee contends that the Court was aware of what was in the possession of appellant and could correctly find that appellant had not sufficiently demonstrated a "semblance of need" necessary to be entitled to the minutes. *Allen* v. *United States, supra,* at 482. The court was therefore correct in denying appellant's motion for production of the Grand Jury minutes.

Arguendo, should the Court determine that the denial of appellant's motion for production of the minutes was error, the Government contends that such denial was harmless error and, in the light of the other prior testimony available to appellant, did not effect the substantial rights of appellant. Rule 52(a), F.R.Crim.P. However, if the Court is of the view that a remand hearing is required to determine the impact on the defense of the original denial of production the Government represents that, on the basis of the impeachment presently of record

through the Jencks Act disclosure, it will, in all probability, be able to demonstrate that no harm resulted from the failure to produce the Grand Jury testimony. See *Allen* v. *United States, supra,* at 482; *De Binder* v. *United States, supra,* at 739.

CONCLUSION

WHEREFORE, for the reasons set forth above, this case should be affirmed or in the alternative, remanded to the District Court for the sole purpose of determining whether the non-disclosure of the Grand Jury minutes was prejudicial to appellant's defense.

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